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No. 83-558

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
PETITIONER,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND
AS NEXT FRIEND OF AMBER TATRO, A MINOR,
RESPONDENTS,

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals' standard for providing related services conflicts with the standard established by this Court in Board of Education of Hendrick Hudson Central School District v. Rowley, ____ U.S. ____, 102 S.Ct. 3034 (1982).

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Irving Independent School District, its board of trustees, and its superintendent have petitioned for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals reported at 703 F.2d 823. To seek clarification of the law affecting the school districts it represents, the Texas Association of

School Boards Legal Assistance Fund, by and through its attorney of record, Susan F. Heiligenthal, hereby registers its support for grant of the petition for writ of certiorari in order to have the judgment of the court below reviewed.

INTEREST OF AMICUS CURIAE

The Texas Association of School Boards, a nonprofit organization, has a membership consisting of more than 1,000 school districts in the State of Texas. Its member schools educate over 99% of the student population of elementary and secondary schools in Texas. In an effort to represent and assist local school boards, the Association seeks to express the concerns of its membership, particularly in a case that so significantly affects every school district in the state.

ARGUMENT FOR GRANT OF THE WRIT OF CERTIORARI

The need for "related services" and their role in providing a free appropriate education under the Education of All Handicapped Children Act (EAHCA) has spawned a great deal of litigation since the passage of the law in 1976. This statute guarantees that handicapped children will receive special education and "related services" to meet their unique needs, including classroom instruction, physical education instruction, home instruction, or instruction in hospitals and institutions. 20 U.S.C. §1401(16). "Related services" are defined as, "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and

counseling services except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education . . ." Id. §1401(17). Related services must be a part of the handicapped child's individualized educational plan (IEP) to the extent that they are needed for the child to benefit from special education. If no special education is required, no related services may be provided.

The standard for interpreting when a related service becomes necessary is the cause for the proliferation of litigation in this area. Among the most important and far-reaching interpretations of the role of related services were those made by the Fifth Circuit, which concluded in this case that clean intermittent catheterization

(CIC) is a related service. Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980) (hereinafter cited as Tatro I). These interpretations not only portend financially onerous consequences for taxpayers and increased confusion on how to treat medical and health services in deciding on student placements, but they also far exceed the guidelines later established by this Court in Board of Education of Hendrick Hudson Central School District v. Rowley, ____U.S. ____, 102 S.Ct. 3034 (1982).

In its second consideration of Tatro, which occurred after the Rowley opinion was issued, the Fifth Circuit held that it must follow its previous interpretations of the EAHCA under "law of the case" principles "unless (1) the evidence on a subsequent trial was substantially different, (2) controlling

authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work a manifest injustice," Tatro v. Texas, 703 F.2d 823, 826 (5th Cir. 1983)(hereinafter cited as Tatro II)(citing White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967)(footnote omitted; enumeration added). The Tatro II panel concluded that none of these considerations applied.

But this Court had indeed "made a contrary decision of the law applicable to such issues." Id. This Court examined whether the related service was necessary "to permit the child to benefit educationally from the [personalized] instruction." 102 S.Ct. at 3042. It did not base this standard on attendance, at any cost, in regular classes. By contrast, the Tatro I panel

went beyond this standard in determining whether the related service was necessary not only for the student to benefit from special education, but also to be able to attend regular classes.

In the first district court opinion, Judge Higgenbotham had correctly recognized that CIC should be required under the statute only if necessary for the student to fully benefit from special education. 481 F.Supp. 1224, 1227 (N.D.Tex. 1979). This ruling, very similar to the one in Rowley, was reversed by the Tatro I Fifth Circuit court. The Tatro I panel found, at variance with the Rowley standard, that since CIC was necessary for the student to attend regular classes, it must be provided regardless of whether or not a free appropriate education could be otherwise provided. In this case, the

life support service had to be provided during school hours if the child was to attend regular classes. This expanded interpretation by the Tatro I panel is crucial since, logically extended, it could require some classrooms to be equipped with hospital beds and medical monitoring devices at public expense in order to provide similar life support services during school hours for children attending regular classes. See 625 F.2d at 563. Obviously, either the Rowley standard needs to be followed or the question of how life support services are excepted from that standard must be answered. Only this Court can provide guidance in this area.

Since Rowley had been decided after Tatro I and the second district court ruling, Tatro v. Texas, 516 F.Supp. 968 (N.D.Tex. 1981), the petitioners argued

to the Tatro II court that if the student could benefit from special education at home or in another institution providing CIC, their obligation to provide a free, appropriate education under EAHCA would be met. 703 F.2d at 829. The Tatro II panel erred in holding that the petitioners were estopped from such a claim, since it was raised for the first time after the Rowley ruling and no attempt had been made to modify the IEP accordingly. That panel should have remanded the case to federal district court for its first review using the new Rowley standard. Unless this Court takes action to hear the case and correct the discrepancies between its own standard and that of the Fifth Circuit, the question of when life support services must be provided at public

expense will continue to be litigated.

The original 1979 IEP for the student in this case apparently had not anticipated the Rowley interpretation of "related services," and had not considered alternative placement options that could have provided Amber Tatro with the needed special education services, without special arrangements for CIC. The many stipulations of fact that have been made during the course of this litigation were, for the most part, made in determining issues not relevant to the application of the Rowley standard. The Tatro II court, as an appellate court, is not in the position to receive the additional evidence from both parties that may be necessary to determine an appropriate placement if it is determined that the 1979 IEP is inappropriate. The mere addition of CIC services will not necessarily cure defects in that plan,

and all of the placement considerations should be reexamined in the wake of Rowley.

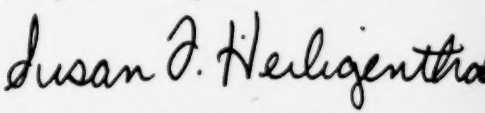
Conclusion

The decision of the court below, constrained by the Tatro I interpretations of the EAHCA issued prior to and in conflict with this Court's interpretation of the law in Rowley, creates an untenuous situation where the definition of related services has been greatly expanded. Rather than prescribe a double standard in defining "related services," this Court's interpretation should be followed, and the Court should remand the case to federal district court for proper application of that standard. If this Court's interpretation is not adopted by the Fifth Circuit, existing case law absolving schools of financial responsibil-

ity for custodial and medical services will no longer be followed. McKenzie v. Jefferson, 565 F.Supp. 404 (D.D.C. 1983). The financial implications of leaving the Fifth Circuit's ruling undisturbed are enormous.

To avoid these implications and unnecessary litigation to reconcile the two opinions, the school districts of Texas, through the Texas Association of School Boards Legal Assistance Fund, request that this Court grant the petition for writ of certiorari.

Respectfully submitted,



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November, 1983

CERTIFICATE OF SERVICE

I do hereby certify that true and correct copies of the foregoing Brief of Amicus Curiae in support of Petitioners' Petition for Writ of Certiorari have been served upon all parties by placing same in the United States Mail addressed to:

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